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to : Strategic Committee on Immigration, Frontiers and Asylum/Mixed Committee
(EU-Iceland/Liechtenstein/Norway and Switzerland)

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Subject : **Draft Regulation of the European Parliament and of the Council establishing
an Entry/Exit System (EES) to register entry and exit data of third country
nationals crossing the external borders of the Member States of the
European Union
- Access for law enforcement purposes**

I. INTRODUCTION

The above proposal was presented by the Commission at the JHA Council/Mixed Committee on 8 March and in SCIFA/Mixed Committee on 9 April 2013, and the Frontiers Working Party/Mixed Committee is currently examining the proposal in first reading.

In the discussions, a large majority of delegations have argued in favour of providing for access to the Entry Exit System (EES) also for law enforcement.

SCIFA/Mixed Committee is invited to examine this issue as further set out below for the purpose of establishing guidelines for its further examination by the Working Party.

It is noted that negotiations with the European Parliament have not yet commenced.

The European Data Protection Supervisor gave his Opinion on the proposal on 19 July 2013 (see doc. 10679/13).

II. BACKGROUND

The Commission proposal is based on Article 77(2)(b) and (d) TFEU. Article 4 of the proposal provides that " the EES shall have the purpose of improving the management of the external borders and the fight against irregular migration, the implementation of the integrated border management policy and consultation between border and immigration authorities by providing access by Member States to the information of the time and place of entry and exit of third country nationals at the external borders and facilitating decisions relating thereto".

The proposal does not provide for access to the EES for law enforcement purposes. In that regard, Article 46(5) of the proposal provides that the first overall evaluation of the EES, to be submitted by the Commission two years after the EES is brought in operation, shall specifically examine the contribution the EES could make in the fight against terrorist offences and other serious criminal offences and will deal with the issue of access for law enforcement purposes. This approach implies that the possible introduction of access for law enforcement purposes would depend on the submission by the Commission and the adoption by the European Parliament and the Council of a legislative proposal to that effect.

However, at the JHA Council/Mixed Committee on 7 March, SCIFA/Mixed Committee on 9 April and the Frontiers Working Party/Mixed Committee on 14 and 28 May and 25 July 2013, a large majority of delegations favoured to provide for access to the EES for law enforcement purposes, and in particular for the purpose of combating cross-border crime and terrorism, from the date of start of the operation of the EES.

In proceedings on 25 July 2013, the Working Party discussed possible approaches and their consequences for allowing access for law enforcement purposes to the EES.

The Presidency has on 15 July 2013 issued the questionnaire set out in doc. 12107/13 seeking further information from delegations as regards current national rules and statistics on law enforcement authorities access to their own national entry exit systems as well on salient cases where such access has been proved crucial in a criminal investigation. The Presidency considers that such information is indispensable in order to examine the necessity and proportionality of any envisaged access for law enforcement purposes and may be useful in future discussions within the Council and with the EP.

On the EP side, the rapporteur in LIBE Committee has taken a positive view on the inclusion of access for law enforcement from the beginning.¹ The Commission reserved its position pending the outcome of the discussions within the Council and, later on, between the co-legislators.

III. MAIN POLITICAL AND LEGAL CONSEQUENCES OF ALLOWING ACCESS TO THE EES FOR LAW ENFORCEMENT PURPOSES

The addition of the possibility for law enforcement authorities to have access to the information stored on the EES for law enforcement purposes has important political and legal implications.

¹ Mrs. Renate SOMMER in her Working Document (DT\941239EN), takes the view that "*In view of the fact, that the EES will be a relatively expensive system with a huge database, the data should be used most efficiently; the rapporteur underlines that there could be an added value if the EES would provide for law-enforcement access from the beginning. Not only because many Member States already have this possibility and have made positive experiences with it but most of all to prevent and prosecute crime, particularly transnational crime (terrorism, drug smuggling etc.)*"

These implications would depend very much on the scope of the provisions relating to law enforcement. Based on discussions and oral explanations by CLS at the Working Party on 25 July 2013, the two following options may be identified:

(a) Law enforcement access as ancillary/secondary objective (VIS model)

The VIS Regulation (Regulation 767/2008) and the VIS Decision (Decision 2008/633/JHA) are based on the approach that the data are stored in the VIS database for the purposes related to visa application procedures and border management, as referred to in Article 2 of the VIS Regulation. VIS contains exclusively information related to these main purposes. No additional information is generated or stored for the purpose of law enforcement. But the information generated for the main purposes may also be accessed for law enforcement purposes under specified conditions and in a limited manner (i.e. access given only in a specific on-going case and to a specifically identified record(s) of the database, without possibility to add or modify the data stored and with no possibility to e.g. search through or compare data).

It is noted that such the approach was also adopted in the recent recast of the EURODAC, Regulation No 2013/603.

This approach has the consequence that law enforcement access can be considered, in legal terms, as an ancillary/secondary objective not affecting the main purpose of the VIS. Furthermore, both the VIS Regulation and the VIS Decision constitute a development of the Schengen acquis, which implies the uniform application of Protocol 19 to both components of the VIS system.

The main purposes of the EES as proposed by the Commission are those related to border management referred to in Article 4 of the proposal.

An approach similar to that followed for the VIS would imply that the limited access be given to EES for the purpose of law enforcement, as an ancillary/secondary objective.

The proposal is based on Article 77(2)(b) and (d) TFEU and would if adopted constitute a development of the Schengen acquis, and more particularly of its external borders policy. The inclusion in the proposal of access to the EES for law enforcement purposes as an ancillary/secondary objective could be envisaged by adding to the current proposal the relevant provisions (specifying notably the conditions of such access). This objective should be clearly stated in the draft Regulation and should be based on the appropriate legal basis. A reference to Article 87(2)(a) TFEU and, in case EUROPOL would also be given access, Article 88(2)(a) TFEU, should be added. If the Commission would oppose these changes, the unanimity of the Council would be required in accordance with Article 293 TFEU.

The Regulation would continue to constitute a development of the Schengen acquis and would continue to be subject to Protocol 19 TFEU, including its rules on participation and opt-out. This would involve the participation of the 4 associated Schengen countries, application to DK and non-participation of IE and UK.

(b) Law enforcement access as equivalent or predominant objective (SIS model)

If it would be deemed necessary to go beyond the approach of the first option, for example by gathering additional information specifically for law enforcement purposes or by providing for broader access, including additional specific law enforcement access features of the system, the law enforcement purpose could no longer be considered as ancillary/secondary, but would be a purpose at least equivalent to the border management purposes. Such an approach was followed when determining the architecture of SIS II, where 2 parts of database has been set up, one Schengen relevant and one "police cooperation" relevant, with different categories of alerts, implying the "variable geometry" of access of participating countries".

This would also mean that the law enforcement access component of the system could not be considered as a measure building upon Schengen acquis, and would fall under Title V Chapter 5 TFEU on police cooperation. The law enforcement access part would be therefore subject to Protocol 21 TFEU, including its rules on participation and opt-in (i.e. non-participation of the 4 Schengen associated countries, non-participation of DK and possible participation of IE and UK).

At the same time the Regulation on the non-LEA part of EES - corresponding to that covered by the current Commission proposal - would continue to constitute a development of the Schengen acquis and would continue to be subject to Protocol 19 TFEU.

The application of Protocols 19 and 21 implies different rules on participation, (so called "variable geometry"). These rules are incompatible in the sense that they cannot be cumulated in one legal instrument. Therefore this would imply that the provisions on law enforcement access would need to be based on an additional separate legislative proposal.

This would mean a need for two separate Regulations:

- one would deal with the border related elements of EES and would constitute a development of the Schengen acquis;
- one would cover the Police Cooperation (LEA) elements of EES (non-Schengen).

It is noted that the agreement of the Commission to this approach is a sine qua non condition, because it would require that it tables a new, separate proposal to this effect.

In the light of discussions so far, the Presidency proposes that a further exploration of option (a) above constitutes the best way forward.

The Presidency invites delegations to express their position in relation to the following questions:

- Should access to the EES be granted for law enforcement purposes from the start of the operation of the EES?
- If access to the EES, for law enforcement purposes is granted from the start of the operations of the EES do you agree that this should be provided for by introducing access for law enforcement purposes as an ancillary/secondary objective in the proposal submitted by the Commission along the lines indicated under option a) above?
- Should access to the EES for law enforcement purposes be limited for the purpose of combating cross-border crime and terrorism? If this is not the case please indicate the other possible purposes of access.

III. CONCLUSION

SCIFA/Mixed Committee is invited to examine the questions set out under II above with a view to agree on an approach for the purpose of further proceedings in the Frontiers Working Party.
